BEFORE THE NATIONAL LABOR RELATIONS BOARD
UNITED STATES OF AMERICA
REGION 19

CHARTWELLS, a division of
COMPASS GROUP USA, INC.

Employer

and Case 36-UC-289

TEAMSTERS LOCAL UNION NO. 58,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Petitioner

DECISION AND ORDER

Upon a petition duly filed pursuant to Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[1] in this proceeding, the undersigned makes the following findings and conclusions:[2]

Summary

The Employer is a State of Delaware corporation engaged in the business of providing vending and food service management and consulting services to various public school districts, including the Evergreen School District in Vancouver, Washington. The parties disagree whether the unit set forth in their Stipulated Election Agreement includes the Employer's substitute employees. The Petitioner seeks to clarify the unit to include all of the substitute employees employed by the Employer in the performance of its food service contract with the Evergreen School District. It contends that they are regular part-time employees, who are included in the unit, that the Employer has waived any objection to their inclusion in the unit by including their names on the *Excelsior* list and by failing to challenge their votes at the representation election, and

[1] Both parties filed timely briefs, which were duly considered.

2 The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case. The Petitioner is a labor organization within the meaning of the Act.

that they share a clear community of interest with the other unit employees. The Employer argues that I should dismiss the petition and that the unit's description excludes substitute employees, that the Petitioner never advanced any proposals that sought to include substitute employees during the parties' collective-bargaining negotiations, and that the substitute employees do not share a sufficient community of interest with the other unit employees.

Based on the following facts and analysis, I find that the substitute employees share a substantial community of interest with the employees who are included in the unit and I shall, therefore, grant the petition to clarify the unit to include the substitute employees.

Background

A. Evidence Bearing on the Parties' Intent Whether to Include Substitute Employees in the Unit

Around January 1, 2001,[3] the Employer purchased a food-service company known as Interpacific Management. As a result of that purchase the Employer acquired a food-service contract with the Evergreen School District in the Vancouver, Washington area. Pursuant to that contract the Employer provides food service for approximately 27 schools in the Evergreen School District.

In late September or early October the Employer's food-service employees contacted the Petitioner concerning representation. The Petitioner thereafter filed a petition with the Board seeking to represent the Employer's employees. On October 16, the Employer and the Petitioner entered into a Stipulated Election Agreement in which the parties agreed to a secret-ballot election to decide whether employees in the following appropriate unit ("the Unit") wished to be represented for the purposes of collective bargaining by the Petitioner:

> **All full-time and regular part-time drivers, kitchen managers, assistant kitchen managers, bakers, cooks, cafeteria-production workers and clean-up crews employed by the Employer in the performance of its Food Service Contract with the Evergreen School District, but excluding all food service directors, food service managers, student workers, office clericals, guards and supervisors as defined in the Act and all other employees**.

The parties presented contradictory testimony concerning their discussions with the Board agent handling this representation petition case as to whether the Unit included substitute employees. The Petitioner's witness claimed that the Board agent assured him that based on the Board agent's conversations with the Employer's representative, the Unit included the substitute employees under the designation of part-time employees and that substitute employees were not one of the classifications sought to be excluded by the Employer. By contrast, the Employer's representative, who signed the Stipulated Election Agreement on behalf of the Employer, testified that the inclusion or exclusion of

[3] All dates hereinafter occurred in 2001 unless otherwise indicated.

substitute employees never arose during his discussions with the Board agent regarding the Unit and that he always assumed that the Unit's description excluded the classification of substitute employees.

After the parties entered into the Stipulated Election Agreement, the Employer submitted an *Excelsior* list setting forth who was eligible to vote in the scheduled election. The list, which was introduced into evidence at the hearing, included the names of substitute employees and those employees had the designation of "SUB" in the margin by their names. The evidence adduced at the hearing established that the Employer did not challenge the votes of any substitute employees who cast ballots at the election. A majority of the employees in the Unit voted in favor of representation by the Petitioner. On December 7, the Petitioner was certified as the exclusive collective-bargaining representative of the employees in the Unit.

Negotiations, between the parties for an initial collective-bargaining agreement, commenced in early 2002.[4] Witnesses presented contradictory testimony at the hearing concerning whether the parties, during negotiations, agreed to include or exclude the substitute employees. One of the Petitioner's witnesses testified that the subject never arose during negotiations and arose only in late August 2002, when a substitute employee questioned whether she would be able to vote on ratification of the agreement reached by the parties. Another witness called by the Petitioner testified, however, that during the initial negotiations meeting the Petitioner's negotiator stated that the contract they were negotiating would cover the substitute employees and that none of the Employer's negotiators objected to that statement. On the other hand, the Employer's witness testified that the subject never arose until the final negotiations meeting. She testified that, at that final meeting, the Petitioner's representatives took the position that substitute employees were included in the Unit, whereas the Employer's representatives took the position that the substitute employees were excluded from the Unit. Neither side advanced collective-bargaining proposals specifically addressed to substitute employees during the negotiations. On September 9, 2002, the employees ratified a five-year agreement, which is effective from August 22, 2002 through August 21, 2007. The parties, however, were unable to resolve whether the Unit included or excluded the substitute employees. In the end, the ratified labor agreement tracked the language in the stipulated election agreement with regard to the Unit description.

There are approximately 140 employees in the Unit. That number also includes approximately 27 employees who were called "supervisors" at the hearing.[5] There are approximately 15 substitute employees.

B. The Substitute Employees' Terms and Conditions of Employment

The substitute employee holds an on-call position. The Employer's payroll administrator telephones the substitute employees from a list between 7:00 and 8:30 a.m.

[4] The record is unclear whether negotiations commenced in January or March 2002.

[5] The record contains insufficient evidence to determine whether these individuals constitute supervisors as defined in Section 2(11) of the Act.

to replace Unit employees who have called in sick.[6] Substitute employees do not fill in for supervisors, assistant managers, or cashiers. Although substitute employees may refuse work assignments, the Employer will terminate their employment if they refuse work on three consecutive occasions or refuse to work at all. When they are called to work, substitute employees work next to, and perform the same duties and functions as, Unit employees. The same supervisors and managers who supervise Unit employees supervise substitute employees. They also work the same range of hours that Unit employees do. Substitute employees also follow the same dress code as Unit employees and the school district does not treat them any differently than it does Unit employees.

On the other hand, the Employer does not guarantee substitute employees any set number of hours of work and it tells them that their employment is not permanent. With the exception of one substitute employee, substitute employees have not worked a full-time schedule of 30 or more hours per week. Unit employees receive benefits such as holiday, sick, and jury-duty pay, and health insurance. They are also eligible to participate in the Employer's 401(k) pension program. In order to receive benefits, an employee must work 27.5 hours per week. Testimony established that substitute employees generally do not receive fringe benefits because they do not work the requisite hours.[7] Substitute employees receive wages at a rate of 25 cents per hour less than Unit employees. The Employer provides written evaluations for Unit employees, but does not do so for substitute employees.

The Employer and its predecessor have employed some of the substitute employees continuously anywhere from 2 to 12 years. Substitute employees can apply for Unit employee positions that the Employer posts. Testimony established that approximately a dozen of the current regular Unit employees are former substitute employees. None of the substitute employees are former Unit employees.

Analysis

As noted above, the parties executed a collective-bargaining agreement in August 2002, but were unable to agree whether substitute employees were included in the Unit. The Employer contends that the Unit description excludes substitute employees whereas the Petitioner contends that the Unit description includes them as regular part-time employees. The parties also disagree whether the substitute employees share a community of interest with the regular Unit employees. There is no evidence that either party abandoned its position concerning the substitute employees during negotiations in exchange for any contract concession.

Unit clarification is not appropriate during the term of a contract where such clarification would upset the agreement of the parties concerning the placement of

[6] The witnesses who testified were not certain whether the payroll administrator contacted the substitute employees alphabetically or by seniority.

[7] Substitute employee Raymond Hausinger testified that he started receiving holiday and sick pay, and funeral leave in the fall of 2001 prior to the election. Documentary evidence in the form of the Employer's time card calculator records showed that two other employees who are categorized as substitute employees received a few hours of holiday and sick pay.

individuals in or out of the unit. *Kaiser Foundation Hospitals*, 337 NLRB No. 165 (Aug. 1, 2002); *Union Electric*, 217 NLRB 666, 667 (1975). The Board, however, will entertain a unit clarification petition filed shortly after a contract is executed where the parties cannot agree whether a disputed classification should be included in the unit and the petitioner did not abandon its position in exchange for a contract concession. *St. Francis Hospital*, 282 NLRB 950 (1987). Accord *Baltimore Sun Co.*, 296 NLRB 1023 (1989). Accordingly, I find that unit clarification is appropriate to resolve the instant dispute whether substitute employees belong in the Unit.

In resolving unit placement of individuals in stipulated election agreement/bargaining unit cases, the Board seeks to determine the parties' intent and then determines whether this intent is contrary to any statutory provision or established Board policy. *Caesar's Tahoe*, 337 NLRB No. 170 (Aug. 1, 2002). The Board applies a three-prong test in which it first determines whether the stipulation agreement is ambiguous. If the intent is expressed in clear and unambiguous terms, the Board enforces the agreement. If the stipulation election agreement is ambiguous, the Board must seek to ascertain the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If it is still unable to determine the parties' intent, the Board applies the community-of-interest standard to decide whether the disputed individuals are included in the stipulated unit. *Id.* As shown below, I find that the parties' stipulation is ambiguous concerning the parties' intent as to whether the unit includes substitute employees, and that extrinsic evidence is insufficient to ascertain the parties' intent.

Contrary to both the arguments of the Petitioner and the Employer, I find that the description of the Unit set forth in the parties' stipulation does not reveal the parties' intent. Although the Petitioner contends that the substitute employees are regular part-time employees as set forth in the description of the stipulated Unit, I find that the express language of the Unit's description neither specifically includes nor excludes "substitute" or "on-call" employees. Thus, I cannot assume that the parties intended to include the substitute employees as regular part-time employees. Contrary to the contention of the Employer, however, the absence of that classification from the Unit's description does not conversely establish that the Petitioner intended to exclude the classification of substitute employees from the Unit.[8] Rather, the parties' intent concerning substitute employees is unclear. See *Caesar Tahoe, supra,* slip op. at 2; *R.H. Peters Chevrolet*, 303 NLRB 791 (1991).

Turning to the second prong of the Board's test, I must seek to determine the parties' intent by analyzing the extrinsic evidence surrounding the parties' agreement. As set forth in the factual section above, the testimony of the witnesses called by the

[8] The Board in *Caesar Tahoe, supra,* slip op. at 3 fn. 5, stated that it would not pass on whether the failure to list a disputed classification, coupled with an express exclusion of "all other employees" would warrant a contrary result, i.e., that the parties' intended to exclude the classification. Although the Unit description here expressly excludes "all other employees" from the Unit, I am unwilling to find that the parties intended to exclude substitute employees in light of the Board's refusal to decide that issue. Indeed, that result would seem particularly harsh here where the substitute employees might be viewed as regular part-time employees, who are included in the Unit's description.

Petitioner and the Employer was contradictory regarding whether the parties intended to include the substitute employees in the Unit. Thus, that testimony is not helpful in resolving intent. Neither party advanced any contract proposals during negotiations to include or exclude the substitute employees. Accordingly, the absence of such proposals is not illuminating as to the parties' intent. I also reject the Petitioner's argument that because the Employer included the names of the substitute employees on the *Excelsior* list, and did not challenge their votes at the election, the Employer intended to include the substitute employees in the Unit. The Board has explicitly rejected the Petitioner's argument that placement of employees' names on the *Excelsior* list, coupled with a failure to challenge their votes, is indicative of the employees' status in the unit. *Kirkhill Rubber Co.*, 306 NLRB 559, 560 fn. 4 (1992). See also *Caesar Tahoe, supra,* slip op. at 4 (submission of an *Excelsior* list is of little help in determining the intended scope of a pre-election stipulation). Accordingly, I conclude that the record contains insufficient extrinsic evidence to determine the parties' intent regarding the inclusion or exclusion of the substitute employees.

As I cannot discern the parties' intent from the language of the stipulated Unit description or from the extrinsic evidence in the record, I must apply the community-of-interest standard in determining whether the substitute employees are included in the Unit. I find that the record evidence establishes that the substitute employees share a substantial community of interest with the regular employees. Thus, they perform the same duties and functions as the Unit employees and work next to the Unit employees while they are performing those duties. Substitute employees also work the same hours during the day as regular employees when they are called into work. Finally, there has been significant one-way interchange with several substitute employees being hired as regular employees in recent years. In these circumstances, the substitute and Unit employees share a community of interest warranting inclusion of the substitute employees in the Unit. See, e.g., *St. Francis Hospital*, 282 NLRB 950 (1987) (unit of full-time and part-time registered nurses is clarified to include Internal Float Pool (IFP) registered nurses because IFP nurses share a community of interest with other nurses where they perform same nursing duties alongside other registered nurses, even though they receive a different wage rate and do not receive any of the regular nurses' fringe benefits other than a cafeteria discount).

The Employer contends that the substitute employees do not share a community of interest with the Unit employees because they do not receive the fringe benefits paid to Unit employees, are paid a different wage rate, do not have a regular schedule or permanent employment, and may refuse work when called. None of these reasons provides a sufficient basis for excluding the substitute employees from the Unit. Part-time or on-call employees do not lack a sufficient community of interest with full-time employees simply because an employer chooses to pay a different wage rate (which here is an insignificant 25 cents per hour) or limit fringe benefits to full-time employees who work the requisite number of hours. See, e.g., *Huckleberry Youth Programs*, 326 NLRB 1272, 1274 (1998) (part-time peer health educators share a community of interest with full-time employees even though the former receive a different wage rate and do not receive fringe benefits); *St. Francis Hospital*, supra. Although the substitute employees

do not have a set schedule like the Unit employees, that is always true with respect to on-call employees. The Board has also determined that on-call employees' ability to reject work is not a basis for excluding them from a unit of regular, full-time employees. See, e.g., *Mercury Distribution Carriers*, 312 NLRB 840 (1993); *Tri-State Transportation Co.*, 289 NLRB 356 (1988). Finally, I do not find that the substitute employees' lack of permanent employment to be a sufficient basis for excluding them from the Unit, particularly where the record here shows that the Employer and its predecessor have employed several of the substitute employees on an on-going basis for anywhere from 2 to 12 years.

As I have determined that the substitute employees share a substantial community of interest with the full-time and regular part-time employees in the Unit, I shall grant the Petitioner's petition and clarify the Unit to include substitute employees.

ORDER

IT IS HEREBY ORDERED that the Petitioner's petition to clarify the Unit to include substitute employees is GRANTED.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 – 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington, D.C. by 5 p.m. EST on **December 13, 2002.** The request may **not** be filed by facsimile.

DATED at Seattle, Washington, this 29th day of November, 2002.

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